95-1689

Supreme Court, U.S.
FILED
APR 17 1996
CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

HARRISTON LEE BASS, JR., M.D., *Petitioner*,

-vs.-

BOARD OF MEDICAL EXAMINERS OF THE STATE OF NEVADA, THEODORE JACOBS, M.D., EVA G. SIMMONS, THOMAS J. SCULLY, M.D., DELMAR E. SNIDER, M.D., IKRAM U. KHAN, M.D., M. RONALD AVERY, JR., M.D., KATHLEEN L. EBNER, H. NAFEES NAGY, MN.D., AND LEO A. WILNER, BOARD OF THE NEVADA STATE BOARD OF MEDICAL EXAMINERS, *Respondents*

On Petition for Writ of Certiorari To The Supreme Court of the State of Nevada

PETITION FOR WRIT OF CERTIORARI

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24pp

QUESTIONS PRESENTED FOR REVIEW

1. What criteria must a State meet to satisfy the Due Process clause in providing "active supervision" to State-sanctioned disciplinary and licensing entities to protect licensed professionals from sham and surreptitious actions or the utilization of "peer" review" proceedings for the improper motives of other competing professionals rather than the benefit of the public.

2. Whether the Supremacy Clause of the United States Constitution requires a State to give full faith and credit to corrective action of the United States Air Force which determined that the wrongfully procured and factually false prior disciplinary action by the Department of the Air Force upon which State discipline was based was void ***ab initio***?

LIST OF PARTIES

There are no parties not named in the caption.

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CITATIONS OF THE OFFICIAL & UNOFFICIAL REPORTS OF THE OPINIONS & ORDERS ENTERED IN THE CASE BY COURTS OR ADMINISTRATIVE AGENCIES

Amended Findings of Fact, Conclusions of Law and Order of the Board of Medical Examiners of the State of Nevada entered in Case No. 9455, *In the Matter of the Complaint Against Harriston Lee Bass, Jr., M.D.*, filed August 6, 1991 (Appendix pp. 15a-24a)

Findings of Fact, Conclusions of Law of the Eighth Judicial District Court of the State of Nevada, County of Clark, entered in Case No. 297956, *Bass v. Board of Medical Examiners* filed May 6, 1994 (Appendix pp. 7a-12a)

Judgment of the Eighth Judicial District Court of the State of Nevada, County of Clark, Remanding Matter for Hearing in Las Vegas entered in Case No. 297956, *Bass v. Board of Medical Examiners* filed May 6, 1994 (Appendix pp. 13a-14a)

Order Granting Petition for Writ Prohibition entered by the Supreme Court of the State of Nevada in Case 25604, *Board of Medical Examiners, et al. v. Eighth Judicial District Court & Bass* filed August 25, 1995 (Appendix pp. 1a-6a0

CONCISE STATEMENT OF THE BASIS FOR JURISDICTION IN THIS COURT

The judgment of the Supreme Court of Nevada was entered on August 25, 1995. The order denying the petition for rehearing was filed on January 18, 1996. The statute which confers jurisdiction on this court to review the judgment in question is 28 USC § 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THIS CASE

United States Constitution, Amendment V - Rights of Persons

> No person. . .shall be deprived of life, liberty or property, without due process of law. . .

United States Constitution, Amendment XIV, Section 1, Rights of Citizens

> ***No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Nevada Revised Statutes 233B.135 Judicial review: Manner of conducting; burden of proof; standard for review.

"3. . . . .The court may remand or affirm the final decision or set it aside in whole or in part if substantial rights of the petitioner have been prejudiced because the final decision of the agency is:

(a) In violation of constitutional or statutory provisions;
(b) In excess of the statutory authority of the agency;
(c) Made upon unlawful procedure;
(d) Affected by other error of law;
(e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
(f) Arbitrary or capricious or characterized by abuse of discretion.

Nevada Revised Statutes 233B.150. Appeal from final judgment of district court.

An aggrieved party may obtain a review of any final judgment of the district court by appeal to the supreme court. The appeal shall be taken as in other civil cases.

Nevada Revised Statutes Chapter 630 Government Licensing and Discipline of Physicians and Assistants

Nevada Revised Statutes 630.047. Applicability.

"1. This chapter does not apply to:

(a) A medical officer of the armed services or a medical officer of any division or department of the United States in the discharge of his official duties for which a license is not required."

Nevada Revised Statutes 630.304. Grounds for initiating disciplinary action.

"The following acts, among others, constitute grounds for initiating disciplinary action:

"1. Obtaining, maintaining or renewing or attempting to obtain, maintain or renew a license to practice medicine by bribery, fraud or misrepresentation or by any false, misleading, inaccurate or incomplete statement."

Nevada Revised Statutes 630.311. Review of complaint; investigation; members of committee; determination by board.

"1. The board or a committee of its members designated by the board shall review a complaint and conduct an investigation to determine whether there is a reasonable basis for the complaint."

Nevada Administrative Code Chapter 630. Applicable Provisions Re: Physicians and Assistants. Disciplinary Action.

§ 630.460 Hearings; Appearance; pleadings; motions; documents.

"5. All motions, unless made during a hearing must be in writing. All written motions must set forth the nature of relief sought, the grounds therefor, and the points and authorities relied upon in support of the motion. A party desiring to oppose a motion may serve and file a written response to the motion within 20 days after service of the motion. The moving party may serve and file a written reply within 10 days after service of the opposition to the motion. A decision on the motion will be rendered without oral argument unless oral argument is requested by the board, in which event the board will set a date and time for hearing."

§630.470 Hearings: Procedure.

"4. Prehearing depositions of witnesses and parties may not be taken.:

5 USC § 552a Privacy Act.

"(a)(7) The term "routine use" means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected.

(b) **Conditions of disclosure.**--No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be--

. . . .

(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section:. . . ."

Department of Defense Directive
July 29, 1982
Number 6000.7

SUBJECT: Dissemination of Information on Medical Officers

A. PURPOSE

Under reference (a), this Directive establishes policy, provides guidance and assigns responsibilities regarding dissemination of information concerning

limitations imposed on DoD medical officers by official action.

. . . .

D. POLICY

It is the policy of the Department of Defense that when a medical officer is in any way unfit to execute his or her responsibilities in the practice of medicine or osteopathy that the medical officer's commander or supervisor will initiate immediately appropriate action, under the credentials review process of the Military Department concerned, to suspend, limit, or withdraw the medical officer's clinical practice privileges. This is not only a regulatory requirement, but a moral and ethical responsibility of the officials involved.

. . . .

F. RESPONSIBILITIES

2. The Secretaries of the Military Departments, or their designees,shall:

. . . .

(c) Ensure that all information transmitted in accordance with section G., below, has been developed in proceedings that accorded due process to the medical officer whose performance or competence is at issue.

G. **INFORMATION REQUIREMENTS**

1. The method of reporting information will be through the Federation of State Medical Boards, using the format attached as enclosure 1."

AIR FORCE REGULATION 168-13

"8-12. **Impartiality of Reviewing Personnel.** Members of the medical staff are not disqualified, per se, from taking part in a practitioner's credentials review, strictly because they are personally acquainted with the practitioner or because they have knowledge of those matters giving rise to the action. Credentials review is, in substance, a peer review function. However, personnel participating in the review should be able to make a fair and impartial review of the case.

. . .

(c) Guidelines contained in this paragraph are intended as general guidance only, and are not mandatory requirements. They are not intended to confer substantive rights upon a practitioner, and no credentials review action should be reaccomplished on the grounds that such action lacked impartial review, unless a showing of the same is made on a factual basis.

STATEMENT OF CASE

Facts Material to Consideration of the Questions Presented

The federal questions sought to be reviewed were first raised by Petitioner in his Answer to the Amended Complaint before the Board of Medical Examiners filed on April 5, 1988 (Appendix 57a-58a). The same federal questions were presented to the District Court in the Petition for Judicial Review. The District Court agreed with Dr. Bass that there was a denial of due process and reversed the Board of Medical Examiners on the issue of venue (Appendix 7a-14a). The Supreme Court of the State of Nevada was apprised of the venue issues as well as all the other Due Process arguments in the Petitioner's Answer to Petition for Writ of Prohibition filed on June 14, 1994.

The following is a time line of the material facts:

6/30/86
Dr. Bass' performance as a surgeon/soldier reviewed in an Officer's Effectiveness Report. Dr. Bass was evaluated as well above standard in the report and Commander recommended then Captain Bass for immediate promotion to Major and further recommended him for appointment of Chief of Surgery Services at Nellis Air Force Base Hospital. Appendix 29a-36a.

8/4/86
Dr. Bass is ordered to a psychiatrist at Nellis Hospital that was not of his choosing. He respectfully declined the order and sought an independent evaluation by his own psychiatrist. Based upon his refusal to obey this order, Dr. Bass was summarily suspended. (This type of military order has been subsequently prohibited by Congress. Pub. L. 102-484, Div. A, Title V, § 545(a)-(h), October 23, 1992, 106 Stat. 2416)

8/26/86
An *ad hoc* Credentials Committee meeting was held to discuss the credentials of Dr. Bass. Neither Dr. Bass nor his then counsel were aware of this *ad hoc* meeting. The consensus of the members at the *ad hoc* meeting was to recommend the termination of the privileges of Captain Bass. (Appendix 37a-38a.) Dr. Bass' promotion and appointment recommended on 6/30/86 is put on hold.

9/18/86
A Credentials Committee hearing was convened over the violation of the military order by Dr. Bass on August 4, 1986. All the members of the *ad hoc* committee who held their secret meeting on August 26th were present. No members of the Credentials Committee advised Dr. Bass or his attorney that they had already reached their determination but proceeded to feign a fair hearing and recommendation was as set

forth in their *ad hoc* committee meeting of August 26th. (Appendix 40a.)

11/17/86
Report was made limiting Dr. Bass' privileges based upon the recommendation of the Credentials Committee. (Appendix 41a-43a)

12/18/86
Dr. Bass discusses the decision with Colonel Pees and receives explanation that this was a non-medical matter which was protected from disclosure by the Privacy Act. (Appendix 44a-45a.)

5/28/87
Dr. Bass is discharged from the United States Air Force.

6/8/87
Dr. Bass files his application to renew his medical license in Nevada without disclosing anything about the report of 11/18/86.

6/30/87
USAF reports the 11/18/86 action to the Federation of State Medical Boards as a limitation or restriction on Bass's medical privileges. (Appendix 46a-48a)

12/14/87
State Board of Medical Examiners files a public complaint alleging Bass was untruthfull on his 6/8/87 application when he didn't disclose the 11/17/86 report (ROA 1-9). Bass was not given an opportunity to explain the application before the complaint

(ROA 120-121) was filed. Bass was denied discovery or any kind concerning any investigation the BME may have done. Subpoenas were quashed concerning any testimony about the investigation on the basis of confidentiality(ROA 99-104).

1/12/88
Bass files motion to dismiss based upon a violation of the Privacy Act 5 USC 552A 9ROA 13-18).

4/5/88
Bass's Answer to Amended Complaint alleges that his answers on his application for renewal of his medical license are correct, that the USAF filed their report in error and that the action of the BME is in violation of the 14th Amendment to the U.S. Constitution and the Privacy Act. (Appendix 55a-59a)

10/12/88
USAF voids the report of 11/17/86 and reinstates Dr. Bass's credentials *ab initio.* (Appendix 27a - 28a)

12/2/88
BME invites Dr. Bass to a hearing on his motion to dismiss. The board acknowledges that they have not read the motion. They refuse to accept copies of the same for their consideration, cut-off counsel for Bass after a few sentences into his presentation and then walked out of the hearing. The motions

were denied. (Transcript of Hearing, 12/2/88, pp. 1-27)

8/6/91
BME enters a order that Dr. Bass violated NRS 630.304 when he failed to advise them of the 11/17/86 report and issued a public reprimand. (Appendix 15a-24a) Dr. Bass appeals to District Court

5/6/94
District Court enters Findings of Fact and Conclusions of Law, and Judgment Remanding Matter for Hearing in Las Vegas. (Appendix 7a-14a) BME petitions Supreme Court of Nevada for Writ of Prohibition.

8/25/95
Nevada Supreme Court grants Petition for Writ of Prohibition. (Appendix 1a-4a)

10/2/95
Dr. Bass files Petition for Rehearing before the Nevada Supreme Court (Appendix 73a-85a.)

1/18/96
Petition for Rehearing denied (Appendix 25a-26a)

REASONS FOR GRANTING THIS WRIT

The State of Nevada Still Exercises No Active Supervision Over Professional Licensing Boards Dispensing Discipline to Protect Licensed Professionals from Sham and Surreptitious Proceedings Entered for Anti-Competitive Purposes

In Patrick v. Burgett, 486 U.S. 94 (1988) this Court required that the individual states must exercise "active supervision" over State Medical Boards to protect individual practitioners from anti-competitive actions by such Boards. Dr. Bass is such a professional who has been victimized by the lack of active supervision. He was a young, black Captain and General Surgeon at Nellis Air Force Base. He received the highest evaluation ratings. Significantly, he pioneered the use of endoscopic surgical procedures at Nellis Air Force Base Hospital, eliminating a significant source of referrals to civilian surgeons in the Las Vegas Valley. Dr. Bass was targeted by some of his colleagues virtually simultaneously when it was determined by the Air Force that he was to be promoted to Major and appointed to supervise them. Although there was no medical basis for adverse action against Dr. Bass, after he was arrested and incarcerated for approximately 12 hours in a matter subsequently dismissed with the record sealed, a disciplinary proceeding was initiated against him in the United States Air Force for failing to obey an order to see a psychiatrist selected by his accusers within the next 15 minutes.

The Nellis Air Force Base Credentials Committee met prior to the hearing with its Legal Advisor to conduct a "dry run" at which time they determined that they would recommend to the Commanding Officers that Dr. Bass' privileges be terminated. This "dry run" or rehearsal was conducted without the knowledge or participation of Dr. Bass or his counsel although the Committee maintained a record of the rehearsal which was later discovered. Appendix 37a-38a. These sham proceedings of the Nellis Air Force Base Credentials Committee were reversed ***ab initio*** subsequently by the United States Air Force as being wrongfully procured and without basis. Appendix 27a-28a.

Meanwhile, Dr. Bass left the United States Air Force. He was informed on December 18, 1986 by Colonel Pees that the wrongfully procured disciplinary action against him was subject to the Privacy Act, 5 USC 552A and need not be reported and further that it would be unlawful to report it to other licensing entities. In reliance on such representation by Colonel Pees documented by his letter (Appendix 44a-45a) Dr. Bass did not report to the State of Nevada that his medical license or privileges had been suspended or restricted.

Upon the State of Nevada Board of Medical Examiners being apprised of the alleged violations by the United States Air Force they initiated formal proceedings against Dr. Bass without conducting any investigation or convening a peer review board as appears to be

required by their procedure. The Board of Medical Examiners has announced to the public and to the professionals that they dispose of 98% of their complaints against physicians during investigation and peer review proceedings which are non-public proceedings. There are no written rules and regulations published concerning that most important phase of the disciplinary proceeding. The Board of Medical Examiners then failed to provide Due Process required by the Fifth and Fourteenth Amendments to the United States Constitution in the formal proceedings initiated against Dr. Bass.

The Board of Medical Examiners refused to accept, read, consider or discuss copies of the Motion they were to hear and in fact walked out of the Motion to Dismiss hearing summarily denying said motion. They also sua sponte moved the venue of the hearing from Las Vegas to Reno after stipulating to move venue to Las Vegas. They determined that the United States Air Force action in dismissing the improperly procured disciplinary action ***ab initio*** was irrelevant and not entitled to full faith and credit under the Supremacy Clause. Appendix 71a.

Subsequently, the Eighth Judicial District Court reversed and remanded the Board's decision addressing in its decision only the issue of venue and declining to address the other substantive due process issues. Appendix 7a and 13a.

The Nevada Supreme Court ignoring those substantive issues other than venue reversed the action of the District Court. Appendix 1a.

To date, this professional has had no hearing on his substantive due process issues and there has been no active supervision by any entity of the State of Nevada over a renegade Board which has utilized its machinery for the improper and anti-competitive purpose of destroying a physician who pioneered the use of endoscopy procedures at the Nellis Hospital eliminating the referral source of local competing surgeons.

The Supremacy Clause of the United States Constitution requires the State of Nevada to give Full Faith and Credit to Corrective Action Which Determined that the Wrongfully Procured and Factually False Prior Disciplinary Action by the Department of the Air Force Upon which State discipline was based was Void *Ab Initio*

The sole basis of the decision of the Board of Medical Examiners was the void order of the United States Air Force. When the Hearing Officer addressed a question to the Board about the effect of the Air Force voiding their order ***ab initio***, they responded as follows:

> ". . .such order has no effect on these proceedings. . ."
>
> (Appendix 72a)

The Board of Medical Examiners then proceeded to rely upon the voided order for the sole basis of their decision against Dr. Bass. The Supremacy Clause of the United States Constitution requires the State of Nevada, its Administrative Agencies and Courts to give full faith and credit to the determinations of the United States Government.

CONCLUSION

The Court should grant this petition for writ of certiorari directing dismissal of the complaint filed against Dr. Bass by the Board of Medical Examiners.

Respectfully submitted,

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Attorney for Petitioner

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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95-1689

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

HARRISTON LEE BASS, JR., M.D., *Petitioner,*

-vs.-

BOARD OF MEDICAL EXAMINERS OF THE STATE OF NEVADA, THEODORE JACOBS, M.D., EVA G. SIMMONS, THOMAS J. SCULLY, M.D., DELMAR E. SNIDER, M.D., IKRAM U. KHAN, M.D., M. RONALD AVERY, JR., M.D., KATHLEEN L. EBNER, H. NAFEES NAGY, MN.D., AND LEO A. WILNER, BOARD OF THE NEVADA STATE BOARD OF MEDICAL EXAMINERS, *Respondents*

On Petition for Writ of Certiorari
To The Supreme Court of the State of Nevada

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT
OF THE STATE OF NEVADA

August 25, 1995
No. 25605

BOARD OF MEDICAL EXAMINERS OF THE STATE OF NEVADA; THEODORE JACOBS, M.D., EVA G. SIMMONS, THOMAS J. SCULLY, M.D., DELMAR E. SNIDER, M.D., IKRAM U. KHAN, M.D., M. RONALD AVERY, JR., M.D., KATHLEEN L. EBNER, H. NAFEES NAGY, M.D., AND LEO A. WILNER, BOARD MEMBERS OF THE NEVADA STATE BOARD OF MEDICAL EXAMINERS,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE STEPHEN HUFFAKER, DISTRICT JUDGE,

Respondents,

and

HARRISTON LEE BASS, JR., M.D.,

Real Party in Interest.

ORDER GRANTING PETITION FOR WRIT OF PROHIBITION

This original petition for a writ of prohibition challenges an order of the district court reversing an order of the Board of Medical Examiners.

On December 14, 1987, petitioner, the Board of Medical Examiners (Board), filed a disciplinary complaint against real party in interest, Dr. Harriston Lee Bass. The Board scheduled the disciplinary hearing to take place in Reno. Bass thereafter filed a motion to have venue changed to Las Vegas.

On April 6, 1988, a conference call was conducted among the parties and the assigned hearing officer. The Board's counsel stipulated to a change of venue if Bass would represent that he needed to have venue in Las Vegas in order to present his case. Bass would merely state that Las Vegas was the more convenient location. The hearing officer granted the motion to change venue.

On December 26, 1990, the hearing officer *sua sponte* reversed the previous order, and ordered venue changed back to Reno because the hearing officer concluded that Bass would not be calling any witnesses from Las Vegas other than himself. On May 14, 1991, a disciplinary hearing was held in Reno. On June 7, 1991, another hearing was held in Reno. Bass was the only witness who testified on his behalf. Although Bass again objected to venue, Bass did not claim that there were specific witnesses that he would have called if the hearing had been in Las Vegas. The Board found Bass guilty of disciplinary violations and

issued a letter of public reprimand. Bass petitioned the district court for judicial review.

On May 6, 1994, the district court reversed the decision of the Board and ordered that the Board conduct a new disciplinary hearing in Las Vegas. The district court concluded that the Board acted arbitrarily and capriciously in changing venue back to Reno, after stipulating to venue in Las Vegas.

On May 16, 1994, the Board filed in this court a petition for a writ of prohibition. The Board contends that: (1) it has the discretion to set venue wherever it wants, absent a venue statute or any due process concerns caused by unavailable witnesses; and (2) NRS 233B.135(3) limits judicial review to matters that prejudice the substantial rights of a petitioner, and that Bass has made no showing of prejudice. Having reviewed the pleadings, we conclude that the district court exceeded its jurisdiction in concluding that the Board acted arbitrarily and capriciously because Bass was not prejudiced. See NRS 34.320.

Accordingly, we grant this petition. We direct the clerk of this court to issue a writ of

prohibition directing the district court to vacate its order granting judicial review.

It is so ORDERED.

/s/ Steffen, C.J.

/s/ Young, J.

/s/ Springer, J.

/s/ Shearing, J.

/s/ Rose, J.

cc: Hon. Stephen L. Huffaker, District Judge
Hon. Frankie Sue Del Papa, Attorney General
Hon. Stewart L. Bell, District Attorney
Page Underwood, Deputy Attorney General
R. Paul Sorenson
Loretta Bowman, Clerk

IN THE SUPREME COURT
OF THE STATE OF NEVADA

Filed August 25, 1995

No. 25605

BOARD OF MEDICAL EXAMINERS OF THE STATE OF NEVADA; THEODORE JACOBS, M.D., EVA G. SIMMONS, THOMAS J. SCULLY, M.D., DELMAR E. SNIDER, M.D., IKRAM U. KHAN, M.D., M. RONALD AVERY, JR., M.D., KATHLEEN L. EBNER, H. NAFEES NAGY, M.D., AND LEO A. WILNER, BOARD MEMBERS OF THE NEVADA STATE BOARD OF MEDICAL EXAMINERS,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE STEPHEN HUFFAKER, DISTRICT JUDGE,

Respondents,

and

HARRISTON LEE BASS, JR., M.D.,

Real Party in Interest.

WRIT OF PROHIBITION

TO: The Honorable Stephen L. Huffaker, Judge of the Eighth Judicial District Court:

WHEREAS, this Court having made and filed its written decision that a writ of prohibition issue,

NOW, THEREFORE, you are directed to vacate your Order granting judicial review, in the case entitled Harriston Lee Bass, Jr., M.D. vs. Board of Medical Examiners, et al., Case No. A297956.

WITNESS The Honorables Thomas L. Steffen, Chief Justice, Cliff Young, Charles E. Springer, Miriam Shearing and Robert E. Rose, Associate Justices of the Supreme Court of the State of Nevada, and attested by my hand and seal this 25th day of August, 1995.

/s/ Janette M. Bloom
Supreme Court Clerk

DISTRICT COURT
CLARK COUNTY, NEVADA

FILED MAY 6, 1994
Case No. A 297956

HARRISTON LEE BASS, JR., M.D.

Petitioner,

vs

BOARD OF MEDICAL EXAMINERS OF THE STATE OF NEVADA; PATRICK DOLAN, Hearing's Officer; THEODORE JACOBS, M.D.; EVA G. SIMMONS; THOMAS J. SCULLY, M.D.; DELMAR E. SNIDER, M.D., IKRAM U. KHAN, M.D.; M. RONALD AVERY, M.D.; KATHLEEN L. EBNER; H. NAFEES NAGY, M.D.; LEO A. WILNER, Board Members of the Nevada State Board of Medical Examiners,

Respondents.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Dates of Hearing: 8-24-92 and 4-18-94
Time of Hearing: 10:00 a.m.

This matter having first come on for hearing for oral argument upon Petitioner Bass' Petition for Judicial Review on August 24, 1992 and the Court at that time having initially found that the issue of venue was not treated properly, left the issue of venue open, and ordered post-hearing briefs to be filed, and the Court having considered those briefs as well as additional

argument of counsel for Petitioner and Respondent on April 18, 1994, and good cause appearing therefor, the Court hereby makes the following findings of fact:

Findings of Fact

1. On February 26, 1988 the Board of Medical Examiners of the State of Nevada (hereinafter "Board") issued a Notice of Hearing in a disciplinary proceeding (No. 9455) against Harriston Lee Bass, Jr., M.D. (hereinafter "Bass") ordering him to appear at a hearing in Reno, Nevada. [ROA pp. 049 through 052].

2. On March 4, 1988, Petitioner Bass, through his counsel, filed a Motion for Change of Place of Hearing from Reno, Nevada to Las Vegas, Nevada and cited as his reasons: ". . . Respondent [Bass] is a resident of the County of Clark, State of Nevada and the majority of all witnesses he intends to call for this hearing are also residents of the County of Clark and that it would be an extreme economic hardship to attempt to transport all the parties to Reno, Nevada."

3. On March 4, 1988 without any opposition being filed by the Board nor any hearing granted, the Board issued an Order denying that Motion. [ROA pp. 064 through 065].

4. On April 5, 1988, Petitioner Bass filed a Petition requesting extraordinary relief in Case No. A265203, Eighth Judicial District Court, before the Honorable Donald M. Mosely, District Judge. Judge Mosely indicated some concerns relative to the Board's refusal to change venue.

5. On April 6, 1988 a hearing was held before Patrick Dolan, Hearings Officer for the Board wherein the issue of venue was discussed at length [ROA, Transcript of April 6, 1988, pp. 49 through 67.]

6. That the following was indicated with regard to venue at that hearing:

"**Mr. Lessly:** Well, you know, let me finish.

I guess I've tried to make it as easy as I possibly can for you, and as I've indicated to you, by regulation I'm not required to respond to any of your motions.

You've made a motion to the board to remove the venue of this case down to Las Vegas. I think you're renewing motions here this morning in front of the hearing officer. As I understand the regulations, the hearing officer is required to rule on motions at the time the hearing begins. You've renewed your motion, and I'm perfectly willing for him to rule that we can move venue in this case to Las Vegas if you're telling me that it's more convenient for you and it somehow impedes the presentation of your defense to this action, and if being in Reno does that, then I'm here to stipulate to that.

That's all you have to say is, 'I need to go to Las Vegas to present my case," and I'll stipulate to it and I'll ask Mr. Dolan to enter the appropriate order and ask the president to so order.

Mr. Sorenson: I think that's the nature of my motion originally, that it is the place where it should be held, in the forum most convenient to the parties. It's as simple as that.

Hearing Officer Dolan: All right. The motion is granted."

[April 6, 1988, transcript of hearing, Page 63, Lines 18-25 & Page 64, Lines 1-21]

7. That accordingly venue was changed from Reno to Las Vegas, even though the Board continued to utilize the services of Reno Hearing's Officer Patrick Dolan.

8. That the Board has appointed Hearings Officers in both Las Vegas and Reno, Nevada.

9. That on October 26, 1990 Hearings Officer Dolan *sua sponte* reversed his previous order granting the change of venue and ordered that the venue be changed to Reno, Nevada. [Petitioner's Appendix pp. 127-131]

10. That subsequently, the disciplinary hearing before Hearings Officer Dolan concerning Dr. Bass was held in Reno, Nevada on May 14, 1991.

11. That at the subsequent hearing before the Board, also held in Reno, on June 7, 1991, counsel for Dr. Bass further objected to the venue. [ROA, Transcript of June 7, 1991, page 8].

12. That the sua sponte decision of the Board's Hearing's Officer to change the venue from Las Vegas to Reno, once the Board had agreed to placing the venue in Las Vegas [electing to not have a hearing in the first instance before Judge Mosely], was without justification, an abuse of discretion, arbitrary and capricious and in excess of the Board's jurisdiction.

13. That Dr. Bass was harmed and prejudiced by a result of the Board's action in sua sponte reversing the venue Order.

14. That any Finding of Fact which is more properly a Conclusion of Law herein, should be so considered.

Based upon the foregoing, Findings of Fact, the Court hereby makes the following Conclusions of Law:

Conclusions of Law

1. That the Board has Hearing's Officers appointed in Las Vegas.

2. That the Board has offices in Las Vegas, Nevada.

3. That the majority of the population is in Las Vegas, Nevada.

4. That the action of the Board having stipulated to the change of venue so that Judge Mosely did not hear the issue, and then *sua sponte*, for no reason, changing the venue back to Reno from Las Vegas constituted arbitrary and capricious conduct in excess of the Board's jurisdiction.

5. That Dr. Bass was harmed and prejudiced by the Board's action in having to travel to Reno and further harmed by not being permitted access to witnesses in Las Vegas.

6. Due to the Board's arbitrary and capricious conduct in excess of its jurisdiction, and further due to its abuse of discretion, pursuant to NRS 233B.135(f) this matter should be remanded for hearing in Las Vegas, Nevada and the Findings of Fact, Conclusions of Law, and Order of the Board entered on June 18, 1991 and the Amended Findings of Fact, Conclusions of Law, and Order entered on August 6, 1991 are hereby accordingly reversed.

7. That any Conclusion of Law which is more properly a Finding of Fact herein shall be so considered.

LET JUDGMENT ENTER ACCORDINGLY.

DATED this 5th day of May, 1994.

/s/ Stephen Huffaker
DISTRICT JUDGE

/s/ R. Paul Sorenson
R. PAUL SORENSON
Nevada Bar No. 002124
513 South Sixth Street
Las Vegas, Nevada 89101
Attorney for Petitioner

DISTRICT COURT
CLARK COUNTY, NEVADA

FILED MAY 6, 1994
Case No. A 297956

HARRISTON LEE BASS, JR., M.D.

Petitioner,

vs

BOARD OF MEDICAL EXAMINERS OF THE STATE OF NEVADA; PATRICK DOLAN, Hearing's Officer; THEODORE JACOBS, M.D.; EVA G. SIMMONS; THOMAS J. SCULLY, M.D.; DELMAR E. SNIDER, M.D., IKRAM U. KHAN, M.D.; M. RONALD AVERY, M.D.; KATHLEEN L. EBNER; H. NAFEES NAGY, M.D.; LEO A. WILNER, Board Members of the Nevada State Board of Medical Examiners,

Respondents.

JUDGMENT REMANDING MATTER FOR HEARING IN LAS VEGAS

Dates of Hearing: 8-24-92 and 4-18-94
Time of Hearing: 10:00 a.m.

This matter having first come on for hearing for oral argument upon Petitioner Bass' Petition for Judicial Review on August 24, 1992 and the Court at that time having initially found that the issue of venue was not treated properly, left the issue of venue open, and ordered post-

hearing briefs to be filed, and the Court having considered those briefs as well as additional argument of counsel for Petitioner and Respondent on April 18, 1994, and the Court having entered Findings of Fact and Conclusions of Law, and based thereupon,

IT IS HEREBY ORDERED that based upon this Court's Findings of Fact and Conclusions of Law that due to the Board's arbitrary and capricious conduct in excess of its jurisdiction, and further due to its abuse of discretion, pursuant to NRS 233B.135(f) this matter is hereby remanded for hearing in Las Vegas, Nevada, and the Findings of Fact, Conclusions of Law, and Order of the Board entered on June 18, 1991 and the Amended Findings of Fact, Conclusions of Law, and Order entered on August 6, 1991 are hereby reversed accordingly

DATED this 5th day of May, 1994.

/s/Stephen Huffaker
DISTRICT JUDGE

/s/ R. Paul Sorenson
R. PAUL SORENSON
Nevada Bar No. 002124
513 South Sixth Street
Las Vegas, Nevada 89101
Attorney for Petitioner

BEFORE THE BOARD OF MEDICAL
EXAMINERS OF THE STATE OF NEVADA

FILED AUGUST 6, 1991
No. 9455

IN THE MATTER OF THE COMPLAINT
AGAINST
HARRISTON LEE BASS, JR., M.D.,
Respondent

_____/

AMENDED FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER

The above-entitled matter came on regularly for hearing and adjudication on Counts Two and Four of the Amended Complaint against Respondent filed January 20, 1988, before the Nevada State Board of Medical Examiners on Friday, June 7, 1991, at the offices of the Nevada State Board of Medical Examiners, 1105 Terminal Way, Suite 300, Reno, Nevada. Respondent, HARRISTON LEE BASS, JR., M.D., was present and was represented by legal counsel, R. Paul Sorenson, Esq.

The Board was constituted by the following members: Theodore Jacobs, M.D.; Kathleen Ebner; Thomas J. Scully, M.D.; M. Nafees Nagy, M.D.; and Eva G. Simmons. Ikram U. Khan, M.D. was absent, and the members of the Investigative Committee of the Board were excused from the proceedings of the Board and took no part in the proceedings of the Board with respect to adjudication of this matter.

It appearing to the satisfaction of the Board that it had jurisdiction over this matter, the members of the Board having confirmed that they had reviewed the pleadings, transcript of hearing before the hearing officer, exhibits introduced at hearing, and the report and recommendation of the hearing officer, the Board proceeded to make a determination pursuant to the provisions of NRS 630.352.

The Board having duly considered the record, the evidence, and law, and being fully advised in the premises, makes its findings of fact, conclusions of law, and order as follows:

FINDINGS OF FACT

I.

Respondent is duly licensed by the Board to practice medicine in the State of Nevada.

II.

That this matter was heard before a hearing officer, Patrick Dolan, Esq., on May 14, 1991.

III.

NRS 630.304(1) provides that the Board of Medical Examiners of the State of Nevada may initiate proceedings against a physician licensed in Nevada on the grounds of obtaining, maintaining or renewing, or attempting to obtain, maintain or renew, a license to practice medicine by bribery, fraud, or

misrepresentation, or by any false, misleading, inaccurate or incomplete statement.

IV.

That Respondent, in his application for licensure in the State of Nevada for the biennial license year period of July 1, 1986 to June 30, 1989, answered "no" to the question on the application asking if Respondent's practice of medicine had been limited in any other jurisdiction.

V.

That Respondent, in his application for licensure in the State of Nevada for the biennial license year period of July 1, 1987 to June 30, 1989, answered "no" to the question on the application asking if Respondent had had staff privileges in a hospital denied, suspended, limited, revoked or not renewed, or whether Respondent had resigned from a medical staff in lieu of disciplinary or administrative action.

VI.

That Respondent's application for registration was prepared and signed by Respondent on June 8, 1987.

VII.

That Exhibit F to Respondent's Motion to Dismiss Action on Ground of Lack of Jurisdiction and for Other Relief, a part of the record in this proceeding, indicates that Respondent's clinical privileges were limited by

the United States Air Force Hospital at Nellis Air Force Base, Nevada, on November 18, 1986.

VIII.

That the aforesaid Exhibit F indicates that the limitations imposed upon Respondent's practice and clinical privileges included the following:

A. No in-house specialty call

B. Must operate with a fully credentialed general surgeon as first assistant.

C. Must undergo 100 percent review of all in-patient records and a 50 percent review of all out-patient records

D. Must establish and maintain contact with a mental health clinic.

IX

That Respondent acknowledged in his testimony before the hearing officer that he answered "no" to questions 4 and 5 on the application for licensure, which questions read as follows:

4. Have you been denied a medical license or surrendered your license to practice in another jurisdiction or had your medical license revoked, suspended or limited in another jurisdiction?
5. Have you had staff privileges in a

hospital denied, suspended, limited, revoked or not renewed, or have you resigned from a medical staff in lieu of disciplinary or administrative action?

X

That Respondent testified before the hearing officer that he correctly answered the questions on the basis of his belief that the actions taken by the United States Air Force were taken on the basis of military matters, not medical matters, and based upon his firm conviction that he would ultimately prevail on the merits of the military matters.

XI

That Respondent acknowledged in his testimony before the hearing officer that he executed an affidavit dated January 10, 1988, in connection with his response to the charges of the Board, and confirmed stating that "at the time I filled out the application I believed I was under no obligation to disclose my private military affairs and further was under the belief that I was under the obligation to not disclose the same as it was a violation of law to do so."

XII

That Respondent confirmed in his testimony before the hearing officer with respect to the actions taken by the United States Air Force concerning his clinical privileges and right to practice that he "was under the obligation to not disclose the same as it was a violation of law to do so."

XIII

That Respondent acknowledged in his testimony before the hearing officer that he had disclosed the United States Air Force limitations imposed upon his practice of medicine to Community Hospital in Clark County, Nevad.a on December 3, 1986; to Desert Springs Hospital in Clark County, Nevada, on December 8, 1986; and the Humana Hospital in Clark County, Nevada, on November 19, 1987.

XIV

That the aforesaid disclosure to Community Hospital and Desert Springs Hospital occurred before June 8, 1987, the date of Respondent's execution of his application for registration with the Board, and the disclosure to Humana Hospital occurred after June 8, 1987.

XV

That Respondent acknowledged in the hearing before the hearing officer that he did not retain legal counsel and commence his efforts to overturn or reverse the adverse clinical privileges action taken by the United States Air Force until after the service upon him upon him of the initial complaint in this matter by the Board, and said complaint was filed with the Board on December 14, 1987.

XVI

That subsequent to the filing of the complaint against Respondent in this administrative action on December 14, 1987, Respondent retained his current legal counsel and initated an appeal with the United States Air Force to reverse the decision of the United States Air Force in limiting his clinical privileges, and a reversal of that action ab initio was made by the United States Air Force as a result of such appeal.

XVII

That the report and recommendation of the hearing officer comments on the credibility of Respondent, stating "It is difficult to accord BASS with a good faith belief that he was under no duty to report the adverse clinical action on his application to the BOARD."

XVIII

That if any of the foregoing findings of fact is more properly deemed a conclusion of law, it may be so construed.

CONCLUSIONS OF LAW

I

That the Board has jurisdiction over Respondent.

II

That the conduct of Respondent in selectively disclosing the adverse action by the United States Air Force to three hospitals, while not disclosing such matter to the Board, is further evidence that Respondent was at the least "misleading, inaccurate, or incomplete" in his response to questions on his application to the Board.

III

That Respondent's disclosure of the action of the United States Air Force to three hospitals is inconsistent with his sworn affidavit of January 10, 1988, stating he was under an obligation to not disclose the action as it was a violation of law to do so, and casts great doubt upon the credibility of Respondent.

IV

That by clear and convincing evidence Respondent is in violation of the provisions of NRS 630.304(1) as alleged in Count Two and Count Four of the amended complaint as he submitted to the Board "misleading, inaccurate or incomplete" responses to questions number 4 and 5 on his June 8, 1987 application for licensure.

V

That if any of the foregoing conclusions of law is more properly deemed a finding of fact, it may be so construed.

ORDER

Based upon the foregoing findings of fact and conclusions of law, and good cause appearing,

IT IS HEREBY ORDERED that Respondent shall be administered a public reprimand pursuant to the provisions of NRS 630.352.

DATED this 31st day of July, 1991.

NEVADA STATE BOARD
OF MEDICAL
EXAMINERS

By /s/ Theodore Jacobs, M.D

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct original AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER on file and of record in the office of the Board of Medical Examiners, in the matter of the Complaint against HARRISTON LEE BASS, M.D., Respondent, Case No. 9945.

I further certify that Theodore Jacobs, M.D., is the President of the Board of Medical Examiners of the State of Nevbada, and that full force and credit is due to his official acts as such; that the signature to the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER is the genuine signature of the said Thoedore Jacobs, M.D.

IN WITNESS WHEREOF, I have hereunto set my hand in my official character as Secretary-Treasurer of the Board of Medical Examiners of the State of Nevada.

DATED: This 5 day of August, 1991.

/s/ Thomas J. Scully
Thomas J. Scully, M.D.
Secretary-Treasurer
Nevada State Board of
Medical Examiners

IN THE SUPREME COURT
OF THE STATE OF NEVADA

January 18, 1996

No. 25605

BOARD OF MEDICAL EXAMINERS OF THE STATE OF NEVADA; THEODORE JACOBS, M.D., EVA G. SIMMONS, THOMAS J. SCULLY, M.D., DELMAR E. SNIDER, M.D., IKRAM U. KHAN, M.D., M. RONALD AVERY, JR., M.D., KATHLEEN L. EBNER, H. NAFEES NAGY, M.D., AND LEO A. WILNER, BOARD MEMBERS OF THE NEVADA STATE BOARD OF MEDICAL EXAMINERS,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE STEPHEN HUFFAKER, DISTRICT JUDGE,

Respondents,

and

HARRISTON LEE BASS, JR., M.D.,

Real Party in Interest.

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.

/s/ Steffen, C.J.

/s/ Young, J.

/s/ Springer, J.

/s/ Shearing, J.

/s/ Rose, J.

cc: Hon. Stephen L. Huffaker, District Judge
Hon. Frankie Sue Del Papa, Attorney General
Hon. Stewart L. Bell, District Attorney
Page Underwood, Deputy Attorney General
R. Paul Sorenson
Loretta Bowman, Clerk

DEPARTMENT OF THE AIR FORCE
Headquarters Tactical Air Command
Langley Air Force Base VA 23665-6001

Dated October 12, 1988

Subject: Medical Credentials -- Command Appeals Committee

To: **Harriston L. Bass, Jr.**
2069 East Sahara
Suite A
Las Vegas NV 82104

1. I have reviewed your appeal, the medical facility commander's decision, and the recommendations of the Command Appeals Committee.

2. The Command Appeals Committee found, by majority vote, that there was substantial evidence to conclude that your surgical practice was not impaired or substandard. There is evidence that the chain of command of 554th Medical Group knew of your incarceration and that you made appropriate efforts to stay in contact with the facility. There is evidence that you did not jeopardize patient health and safety when you left the operating room without the permission of the operating surgeon. The Command Appeals Committee has recommended that your appeal be granted and full reinstatement of your medical credentials ***ab initio.***

3. After review of the Command Appeals Committee findings, it is my decision that your medical credentials be reinstated ***ab initio***.

4. You may appeal my decision to HQ USAF/SG through HQ USAF/SGPQ. You must send your written appeal via certified mail within ten (10) duty days of receipt of this notification. The address is HQ USAF/SGPQ, Bolling AFB, DC 20337-6188. My decision will remain in effect during the appeal.

/s/ Robert A. Buethe,
ROBERT A. BUETHE, JR.
Brigadier General, USAF, MC
Command Surgeon

cc: 554th Med Gp/SG
HQ USAF/SGPQ
HQ AFMPC/SGC
R. Paul Sorenson, Esq.

OFFICER EFFECTIVENESS REPORT
June 30, 1986

I. Ratee Identification Data (Read AFR 36-10 carefully before filling in any item)

1. Name (*Last, First, Middle Initial*)
BASS, HARRISTON L.

2. SSN
337-50-6458FV

3. Grade
CPT

4. DAFSC
9416

5. ORGANIZATION, COMMAND, LOCATION
USAF HOSPITAL NELLIS (TAC), NELLIS, AFB, NV.

6. PAS CODE
NJOTFD50

7. PERIOD OF REPORT
From 30 JUN 85 Thru 29 JUN 86

8. NO. DAYS OF SUPERVISION
343

9. REASON FOR REPORT
ANNUAL

II. JOB DESCRIPTION

1. DUTY TITLE
General Surgeon

2. KEY DUTIES, TASKS AND responsibilities

Screens, diagnoses and treats general surgery cases, performs major and/or minor operations on patients requiring surgery. Takes care of inpatients, outpatients and sees patients on consultation from other departments. Performs Medical Officer of the Day duties. Also performs upper endoscopic examinations and colonoscopy.

III. PERFORMANCE FACTORS

Specific example of performance required **[ratings:**

Not Observed
Far Below Standard
Below Standard
Meets Standard
Above Standard
Well Above Standard]

1. JOB KNOWLEDGE (*Depth, currency, breadth)*

WELL ABOVE STANDARD

Is a well trained general surgeon. Just finished residency in general surgery and is current in surgical techniques. Maintains job knowledge through broad reading and attending conference downtown.

2. JUDGMENT AND DECISIONS
(*Consistent, accurate, effective*)

WELL ABOVE STANDARD

His assessment of patients' problems is consistently sound and logical. Goals are accurately achieved as manifested by short recuperation of patients upon which he has operated.

3. PLAN AND ORGANIZE WORK
(*Timely, creative*)

ABOVE STANDARD

is adjusting to organized workload so as to have ample time to perform his operations and be on time to see patients in the clinic.

4. MANAGEMENT OF REOURCES
(*Manpower, material, fiscal*)

WELL ABOVE STANDARD

Utilizes equipment at this facility by performing upper endoscopy and colonoscopy. Treats all cases within his capabilities without compromise to quality care.

5. LEADERSHIP
(*Initiative, accept responsibility*)

WELL ABOVE STANDARD

Demonstrates interest in teaching other providers to perform endoscopy. He gave a very thorough lecture to the dentists about wound care and hemorrhage control.

6. ADAPTABILITY TO STRESS

(Stable, flexible, dependable)

WELL ABOVE STANDARD

Displays calmenss and exceptional poise when confronted with difficult cases. He is confident in managing stressful cases.

7. ORAL COMMUNICATION

(Clear, concise, confident)

WELL ABOVE STANDARD

Speaks fluently and gains the confidence of his patients through detailed explanations of the procedure to be performed.

8. WRITTEN COMMUNICATION

(Clear, concise, organized)

WELL ABOVE STANDARD

Pertinent information is well documented in the patient chart. They are clear, concise and with diagrams. His line of thought is logical and he keeps his charts up to date.

9. PROFESSIONAL QUALITIES

(Attitude, dress, cooperation, bearing)

WELL ABOVE STANDARD

Possesses good military bearing, and is neatly dressed. He is a volunteer to the Air Force and has a high regard to military service.

10. HUMAN RELATIONS

(Equal opportunity participation, sensitivity)

WELL ABOVE STANDARD

Consistently fair and impartial and supports the ideals of equal opportunity. Treats all patients of all creeds.

IV. ASSIGNMENT RECOMMENDATION

1. STRONGEST QUALIFICATION:
Job Knowledge

2. SUGGESTED JOB (*Include AFSC):*
Chief, Surgery Services (9416)

3. ORGANIZATION LEVEL
USAF Hospital

4. TIMING
1987

V. EVALUATION OF POTENTIAL

Compare the ratee's capability to assume increased responsibility with that of other officers whom you know in the same grade. Indicate your rating by placing an "X" in the designated portion of the most appropriate block."

Highest Rating: ***Rater***
Highest Rating: ***Addn Rater***
Highest Rating: **Indorser**

VI. RATER COMMENTS

Captain Bass is a well trained general surgeon. He just finished his residency last year and volunteered to join the Air Force. He is current in his surgical skills and techniques. Despite his being in the Air Force for only a year, he has been a great help to this facility as seen by his untiring efforts to work in the surgical department and his initiative to impart his knowledge to other care proviers. He should be promoted

upon eligibility and encouraged to remain in the Air Force

Name, Grade, BR of SVC, ORGN, COMD. Location

LEONARD G. SANIDAD, Col, USAF, MC.
USAF Hospital Nellis (TAC)
Nellis Air Force Base, Nevada

Duty Title

Chief, Surgical Clinic

Date

30 Jun 86

SSAN

220-60-7240FV

SIGNATURE

/s/ Leonard G. Sanidad

VII. ADDITIONAL RATER COMMENTS

Concur
Captain Bass is a knowledgeable and capable physician. His colonoscopy expertise has significanly broadened our diagnostic capability. Retain and promote.

Name, Grade, BR of SVC, ORGN, COMD. Location

JOSEPH J. DAVEY, Col, USAF, MC.
USAF Hospital Nellis (TAC)
Nellis Air Force Base, Nevada

Duty Title

Chief, Hospital Services

Date

30 Jun 86

SSAN

457-66-8254FV

SIGNATURE

/s/ Joseph Davey

VIII INDORSER COMMENTS

Concur
Captain Bass has demonstrated superior patient care abilities. His adaptation to military medicine has proceeded well and he is well versed in his responsibilities of officership. His handling of surgical cases and postoperate managment has been exceptional. His sensitivity and rapport with patients is likewise excellent. His willingness to teach other providers is commendable. Retention and promotion are in the best interests of the Air Force.

Name, Grade, BR of SVC, ORGN, COMD. Location

RICHARD C. PEES, Col, USAF, MC.
USAF Hospital Nellis (TAC)
Nellis Air Force Base, Nevada

Duty Title

Commander

Date

30 Jun 86

SSAN

180-34-9502FR

SIGNATURE

/s/ Richard C. Pees

MEMO FOR RECORD

September 2, 1986

Subject: Review of Clinical Privileges--
Captain Bass

1. On Tuesday, 26 August 1986 at 1630, an ad hoc group of the Credentials Committee met in the main conference room to discuss subject matter. The following individuals were present:

Col Dean Willsey - SGD (Chairperson)
Col Leonard Sanidad - SGNSS
Lt Col Jane Bigelow - SGN
Maj Michael Schiano - SGHSO
Maj Eric Wohlrab - SGF
Maj James Meldrum - SGHL
Cpt John Lewis - SGHM
Cpt Roger Belcourt - SGHG

Guests present:

Lt Col H. B. Nicholson, Jr. - SGA (Recorder)
Maj Deborah Ain - SGHQ
Cpt Everett Jones -SGHMM
Mr Todd Norton - SGJA (Legal Advisor)

2. The objective of this meeting was to gain consensus on a recommendation to the Commander regarding Captain (Dr) Bass' privileges. Major Wohlrab, the investigating officer for this case, presented his report. Attendees discussed previous incidents involving Captain Bass.

3. Consensus of the group was to recommend to the Commander termination of

privileges for Captain Bass. Mr. Norton will review the evidence obtained to date with the medical law consultant at Wilford-Hall USAF Medical Center.

4. The meeting adjourned at 1605.

/s/ H. L. Nicholson, Jr.
H. L. Nicholson, Jr., Lt. Colonel, USAF, MSG
Recorder

DEPARTMENT OF THE AIR FORCE
USAF Hospital Nellis (TAC)
Nellis Air Force Base, NV 89181

Dated: September 12, 1986

Reply to Attn of: SGH

Subject: Credentials Hearing Committee Rescheduling

TO: Lt Col Kessler
Lt Col Premsrirut
Lt Col Bigelow
Cpt Lewis
Cpt Belcourt
Mr Norton

As requested in the attached letter, the Credentials Hearing Committee originally scheduled for **15 Sep 86** has been changed to **1600, 19 Sep 86** in the main conference room.

/s/Galen S. Wooley
GALEN S. WOOLEY, Colonel, USAF, M.C.
Chief, Hospital Services

1 atch
JAJD Ltr., 10 Sep 86

EXCERPT of

TRANSCRIPT OF CREDENTIALS HEARING COMMITTEE

September 19, 1986

****

RECOMMENDATIONS:

It is the unanimous conclusion of this committee that the credentials of Doctor Bass to practice medicine at this facility be terminated.

(Page 186)

DEPARTMENT OF THE AIR FORCE
USAF Hospital Nellis (TAC)
Nellis Air Force Base NV 89191-5300

Dated: November 18, 1986

Reply to
Attn of: SGPQ

Subject: Report on Captain Harriston L. Bass, Jr.,

To: HQ AFMPC/SGPC

According to AFR 168-13, paragraph 8-13, the following information is submitted:

1. Practitioner affected:

a. Bass, Harriston L, Jr.

b. Captain

c. M.D.

d. Graduated from Howard University, Washington, D.C. 1980

e. Home of Record: Chicago, Illinois

f. DOB: 28 Jul 1954

g. Licensed in state of: Illinois

h. Date licensed: Illinois - 18 Sep 84

2. Type of action taken: Capt Bass' credentials were summarily suspended on 4 Aug 86. An investigative officer was appointed and he submitted his report on 25 Aug 86. A credentials hearing committee was then appointed with their report submitted on 29 Sep 86 and validated by the legal advisor on 14 Oct 86. The Credentials Committee met and submitted their recommendations to the MFC on 2 Oct 86. The Credentials Committee notified Capt Bass on 20 Oct 86 and on 17 Nov 86 the MFC informed Capt Bass of his restricted privileges.

3. Date of final action: 17 Nov 86.

4. Summary of facts: Capt Bass' credentials were summarily suspended on 4 Aug 86 as a result of his being arrested and incarcerated in the local civilian jail. The arrest was a result of a domestic altercation. Capt Bass was the only general surgeon available at USAF Hospital Nellis for surgical duties and he failed to properly notify appropriate authorities of his inability to perform his duties. After a thorough and exhaustive review of his performance and practice, restricted privileges were reinstated on 17 Nov 86. The restrictions that apply are:

a. In-house specialty call;

b. Must operate with a fully credentialied general surgeon as first assistant;

c. 100 percent review of all inpatient and 50 percent review of all outpatient records;

d. establish and maintain contact with the mental health clinic;

e. no off-duty employment;

f. complete review of performance and practice will be reaccomplished in 90 days.

Additionally, AFR 36-2 action was initiated against Capt Bass on 31 Oct 86 by the Wing Commander, Colonel Henry M. Hobgood.

/s/ Richard C. Pees
RICHARD C. PEES, Colonel
USAF, MC
Director, Base Medical Services

cc: HQ TAC/SG
HG AFMSC/SGPC

DEPARTMENT OF THE AIR FORCE
USAF Hospital Nellis (TAC)
Nellis Air Force Base, NV 89181

Dated December 18, 1986

Subject: Privileges - Capt Harriston L. Bass, Jr.

To: Whom it May Concern

1. Captain Bass had his privileges at USAF Hospital Nellis, Nellis AFB, Nevada, suspended on 4 August 1986. This action was taken pending investigation into the charges of violation of military duties. Procedures as specified in Air Force regulations were followed.

2. The investigation included a review of clinical practice, records, documentation, surgical skills, morbidity/mortality incident rates and psychiatric evaluation by a civilian psychiatrist. There were no deficiencies identified in treatment protocols, documentation, inappropriate surgical procedures, or abnormal morbidity/mortality rates. The psychiatric evaluation likewise did not document any impairment of judgment or function but did reveal domestic problems.

3. Restricted privileges were returned to Captain Bass on 17 November 1986. The restrictions that were applied included increased review of medical records, in-house specialty call, operating with a second general surgeon as first assistant, and continued counseling for the domestic problems. These restrictions are to be re-evaluated at the 90-day point to determine if

sufficient progress in adapting to the military environment had been made. Based on that re-evalaution, the restrictions would then be either removed, extended or action initiated to separate Captain Bass for the best interest of the Air Force.

/s/ Richard C. Pees
RICHARD C. PEES, Colonel, USAF, MD
Commander

DEPARTMENT OF THE AIR FORCE
Headquarters United States Air Force
Bolling. AFB, D.C. 20332

Dated: June 30, 1987

Reply to
Attn of: SGPQ

Subject: Report of Adverse Clinical Privileges Action

To: Executive Director-Secretary
Federation of State Medical Boards
of the United States, Inc.
2640-B West Freeway, Suite 138
Fort Worth TX 76012-7199

1. Captain Harriston Lee Bass had his clinical privileges limited by USAF Hospital Nellis, Nellis AFB NV. In accordance with our agreement, the following information is provided:

a. Degree: Medical Doctor

b. University: Howard University

c. Home of Record: Darien, IL

d. Date of Birth: 28 Jul 54

e. State of Licensure: Illinois - 036-064867, 1984; Nevada - 5314, 1985

f. Clinical Privilege Action Taken: Limited

g. Date of Action: 18 Nov 86

h. Reason for Report: Capt Bass' clinical privileges were suspended on 4 Aug 86 after he was arrested and incarcerated by local civilian authorities for a domestic altercation. His mental state following release was deteremined by the credentials committee chairperson to be potentially harmful to patient safety. Following an investigation, the credentials committee recommended that Capt Bass's privileges be limited. The hospital commander agreed with the recommendation. The limitations imposed included the following:

(1) No in-house specialty call

(2) Must operate with a fully credentialed general surgeon as first assistant

(3) Must undergo a 100% review of all inpatient records and a 50% review of all outpatient records

(4) Must establish and maintain contact with the mental health clinic.

2. Requests for further information may be sent to:

HQ USAF/SGPQ (Capt O'Shea)
Bolling AFB DC 20332-6188
(202) 767-2591

/s/ Robert W. Poel
ROBERT W. POEL,
Colonel, USAF, MC
Chief, Quality Assurance Division
Office of the Surgeon General

cc: ASD/HA
AFMPC/SGCQ
ANG/SG
AFRES/SG
USAFRS/RS
554th Med Gp/SG

BEFORE THE BOARD OF MEDICAL
EXAMINERS OF THE STATE OF NEVADA

Filed: January 20, 1988
Case No. 9455

IN THE MATTER OF THE COMPLAINT
AGAINST
HARRISON LEE BASS, JR., M.D.,

RESPONDENT.

_____/

AMENDED COMPLAINT

Pursuant to the provisions of Chapter 630 of the Nevada Revised Statutes, and by virtue of the authority vested in it by said chapter, the Board of Medical Examiners of the State of Nevada, having a reasonable basis to believe that HARRISON LEE BASS, JR., M.D., (hereinafter "Respondent") has violated the provisions of said chapter, hereby issues its formal Amended Complaint, by and through its secretary, stating the Board's charges and allegations in that respect as follows:

I.

That M. Ronald Avery, M.D., Secretary of the Board of Medical Examiners of the State of Nevada, pursuant to the instructions of the Board and on behalf of the Board, hereby makes and signs this Amended Complaint in his official capacity as Secretary, and not otherwise.

II.

That Respondent is now, and at all times alleged herein was, licensed by the Board of Medical Examiners of the State of Nevada to practice medicine in the State of Nevada.

COUNT ONE

I.

That NRS 630.301(2) provides that the Board of Medical Examiners of the State of Nevada may initiate disciplinary proceedings against a physician licensed in Nevada on the grounds of suspension, revocation, modification or limitatation of the licensee's license to practice medicine by another jurisdiction, or the surrender of the license or discontinuing the practice of medicine while under investigation by any licensing authority, a health and care facility, a branch of the Armed Services of the United States, an insurance company, an agency of the Federal Government, or an employer.

II.,

That Respondent's clinical privileges were limited by the United States Air Force, a branch of the Armed Services of the United States, and an agency of the federal government, at Nellis Air Force base on November 17, 1986, and the following restrictions were placed on Respondent's practice of medicine at Nellis Air Force Base, Nevada:

A. In-house specialty call.

B. Must operate with a fully credentialed general surgeon as first assistant.

C. One hundred percent (100%) review of all in-patient and fifty percent (50%) review of all out-patient records.

D. Must establish and maintain contact with the Mental Health Clinic.

E. No off-duty employment.

F. Complete review of performance and practice to be accomplished in ninety (90) days, after November 17, 1986.

COUNT TWO

I.

That NRS 630.304(1) provides that the Board of Medical Examiners of the State of Nevada may initiate disciplinary proceedings against a physician licensed in Nevada on the grounds of obtaining, maintaining or renewing, or attempting to obtain, maintain or renew, a license to practice medicine by bribery, fraud or misrepresentation, or by any false, misleading, inaccurate or incomplete statement.

II.

That Respondent, in his application for licensure in the State of Nevada for the July 1, 1987 through June 30, 1989, biennial licensure period answered "no" to the question on said

application for licensure asking if Respondent's practice of medicine had been limited in any other jurisdiction.

III.

That at the time Respondent executed said application for licensure with the Nevada State Board of Medical Examiners and forwarded said application to the Board for licensure, Respondent's practice in the United States Air Foce had been limited as set forth in Count II above.

IV.

That Respondent's conduct in failing to disclose the United States Air Force's restriction on his practice of medicine, constitutes a violation of NRS 630.304(1) by renewing, or attempting to renew, a license to practice medicine by fraud or misrepresentation, or by a false, misleading, inaccurate or incomplete statement.

COUNT FOUR

I.

That NRS 630.304(1) provides that the Board of Medical Examiners of the State of Nevada may initiate disciplinary proceedings against a physician licensed in Nevada on the grounds of obtaining, maintaining or renewing, or attempting to obtain, maintain or renew, a license to practice medicine by bribery, fraud or misrepresentation, or by any false, misleading, inaccurate or incomplete statement.

II.

That Respondent, in his application for licensure in the State of Nevada for the July 1, 1987 through June 30, 1989, biennial licensure period answered "no" to the question on said application for licensure asking if Respondent had had staff privileges in a hospital denied, suspended, limited, revoked or not renewed, or whether Respondent had resigned from a medical staff in lieu of disciplinary or administrative action.

III.

That at the time Respondent executed said application for licensure with the Nevada State Board of Medical Examiners and forwarded said application to the Board for licensure, Respondent's clinical privileges at United States Air Force Hospital, Nellis Air Force Base, Nevada, were suspended on August 4, 1986.

IV.

That Respondent's conduct in failing to disclose the suspension of clinical privileges at United States Air Force Hospital, Nellis Air Force Base, Nevada, constitutes a violation of NRS 630.304(1) by renewing, or attempting to renew, a license to practice medicine by fraud or misrepresentation, or by a false, misleading, inaccurate or incomplete statement.

WHEREFORE, the Secretary of the Nevada State Board of Medical Examiners requests that a hearing of this Amended Complaint be had as

provided by law, and that after said hearing, the Board take such action as may be just and proper pursuant to Nevada Revised Statutes.

Dated this 20th day of January, 1988.

NEVADA STATE BOARD OF
MEDICAL EXAMINERS

BY:_____
M. RONALD AVERY, M.D.
Secretary-Treasurer

VERIFICATION

Under penalty of perjury, the undersigned declares that he is the Secretary-Treasurer of the Nevada State Board of Medical Examiners; that he knows the contents of the foregoing Amended Complaint; that the pleading is true of his own knowledge, except as to those matters stated upon information and belief, and that as to those matters, he believes them to be true.

Dated this 20th day of January, 1988.

/s/ M. Ronald Avery, M.D.
M. RONALD AVERY, M.D.

BEFORE THE BOARD OF MEDICAL
EXAMINERS OF THE STATE OF NEVADA

Filed: April 5, 1988
Case No. 9455

IN THE MATTER OF THE COMPLAINT
AGAINST
HARRISON LEE BASS, JR., M.D.,

RESPONDENT.

/

ANSWER TO AMENDED COMPLAINT

COMES NOW, Respondent, HARRISTON LEE BASS, JR., M.D., by and through his attorney, R. PAUL SORENSON, and in answer to the Amended Complaint on file herein, admits, denies and alleges as follows:

FIRST DEFENSE

(COUNT ONE)

1. Respondent admits the allegations contained in Paragraph I.

2. Respondent denies the allegations contained in Paragraph II in all parts, and in further answer to said paragraph, alleges that the action referred to that was taken on November 17, 1986 was for administrative purposes of the United States Air Force only and was not a limitation or restriction of privileges as is commonly understood in the civilian medical community.

SECOND DEFENSE

(COUNT TWO

1. Respondent admits the allegations contained in Paragraphs I and II.

2. In answer to Paragraph III, Respondent alleges that at the time he executed the renewal application for licensure, he was no longer in the Air Force, having been granted a general discharge under honorable conditions and the administrative proceedings that were referred to in Count I of the Amended Complaint ceased as they were moot. Respondent further denies any and all other allegations contained in Paragraph III.

3. In answer to Paragraph IV, Respondent denies that he violated NRS 630.304(1) as alleged in that paragraph and in further answer thereto, alleges that the answers that he placed on his application for renewal of medical license were placed there in a good faith belief by the Respondent that the Air Force incident was purely an administrative procedure, for military purposes only, and that its disclosure was a violation of the Privacy Act, 5 USC 552A and further beyond the jursidiction of this Board, NRS 630.047(1)(a) and still further a violation of NRS 179.285.,

THIRD DEFENSE
(COUNT THREE)

Count Three was dismissed pursuant to an Order entered by Theodore Jacobs, M.D.,

President of the Nevada State Board of Medical Examiners on February 26, 1988.

FOURTH DEFENSE
(COUNT FOUR)

1. Respondent admits the allegations contained in Paragraphs I and II.

2. Respondent denies the allegations contained in Paragraph III.

3. Respondent denies the allegations contained in Paragraph IV, and in further answer to said paragraph, realleges Paragraph 3 of the Second Defense as though set forth herein in its entirety.

FIRST AFFIRMATIVE DEFENSE

The Amended Complaint fails to state a cause of action upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE
(LACK OF SUBSTANTIVE DUE PROCESS)

That the proceedings before this Board violate the substantive due process requirements of the Fourteenth Amendment of the United States Constitution.

THIRD AFFIRMATIVE DEFENSE
(VIOLATION OF NRS 233B.130)

The action of the Board violates NRS 233B.130 in that the Board neither contacted nor sought an explanation from Respondent in

the manner pfovided by said statute prior to the filing of a public complaint.

FOURTH AFFIRMATIVE DEFENSE
(VIOLATION OF 5 USC 552A - PRIVACY ACT)

That the Board knew or should have known that the filing of this public complaint was a violation of 5 USC 552A - the Privacy Act.

FIFTH AFFIRMATIVE DEFENSE
(VIOLATION OF NRS 630.047(1)(a)

That the complaint filed by this Board is beyond its jurisdiction and a violation of NRS 630.047(1)(a) which provides that the chapter governing physicians does not apply to a medical officer in the armed forces in the discharge of this official duties for which a Nevada license is not required.

SIXTH AFFIRMATIVE DEFENSE

That the Board has failed to establish complete rules of practice and has failed to maintain public files as directed by the Legislature of the State of Nevada; failed to follow the statutes and regulations that have been adopted and have arbitrarily and capriciously punished and damaged the Respondent.

SEVENTH AFFIRMATIVE DEFENSE
(VIOLATION OF NRS 179.285, ETC.)

That the Board has violated NRS 179.295 and an Order of the Eighth Judicial District Court in Case No. A252963 sealing the records of the arrest of Respondent on August 3, 1986,

which order was intended to prevent the release of information concerning those proceedings and the events and proceedings relating to the arrest. That in addition, the Board knew or should have known that all of the subsequent events they referred to resulted from the arrest on August 3, 1986, which has been dismissed and sealed.

WHEREFORE, Respondent prays that the Amended Complaint on file herein be dismissed with prejudice and he be granted such other and further relief as previously prayed for and deemed reasonable in the premises.

/s/ R. Paul Sorenson
R. PAUL SORENSON
Attorney for Respondent
323 Las Vegas Blvd.So.
Las Vegas, NV 89101

BEFORE THE BOARD OF MEDICAL
EXAMINERS
OF THE STATE OF NEVADA

Filed January 30, 1990
Case No. 9455

In the Matter of the Complaint

Against

HARRISTON LEE BASS, JR., M.D.,

Respondent.

/

OPENING BRIEF OF RESPONDENT RE: LEGAL ISSUES AS ESTABLISHED BY THE HEARING'S OFFICER IN HIS REPORT AND RECOMMENDATIONS

COMES NOW, Respondent, HARRISTON LEE BASS, JR., M.D., Respondent in the above entitled action and submits his Opening Brief Re: Legal Issues as Established by the Hearing's Officer in his Report and Recommendations and states as follows:

Introduction

The Hearing's Officer in his Report and Recommendation dated August 15, 1989 stated in part as follows:

> "Specifically, the parties need to brief and argue the case-law and statutory authority for use of the military practice

limitation as the basis for an alleged violation of N.R.S. 630.301(2); the effect of the sealing order in the criminal action on a subsequent application for the privilege to practice medicine; the effect of the pending appeal, see Molnar v. State of Nevada Ex Rel. Board of Medical Examiners of the State of Nevada, 105 Nev. Advance Opinion 45 (1989) of the military limitation decision on appeal by virtue of an order reversing the limitation ab initio."

The Hearing's Officer also stated in that Report and Recommendation that the Opening Brief was to cover the above legal issue along with any other issues felt relevant and/or material to the resolution of this matter.

Respondent has previously submitted additional legal issues. We have addressed certain of these issues herein, and have previously briefed the other issues herein. The issues that we are going to attempt to re-brief and brief herein are:

1. Should the Board of Medical Examiners and Hearing's Officer Dolan be disqualified from further hearing and making further determination in this matter for the reason that they have prejudged this matter?

2. Were Dr. Bass' privileges ever limited by the United States Air Force?

3 Has due process as required by the Fifth and Fourteenth Amendments of the United States and Nevada

Constitutions been accorded to Respondent Bass throughout these proceedings, including, but not limited to: during investigation of this matter; during peer review of this matter; commencement of disciplinary proceedings; filing of a public complaint; hearings; and appellate rights?

4. Does the Board of Medical Examiners and the Hearing's Officer have jurisdiction to proceed in this matter?

This brief is merely submitted to satisfy the requirements of the Hearing's Officer's Report and Recommendation and is not a waiver of any and all rights and objections Respondent has in this matter.

ARGUMENT

I.

The Board of Medical Examiners and Hearing's Officer have Prejudged the Matter Herein

The prior transcript of the proceedings before this Hearing's Officer and before the Board of Medical Examiners (hereinafter referred to as "Board") reflect hostility on behalf of the Board to Dr. Bass and a serious prejudgment of the issues which have already been briefed in the numerous motions before the Hearing's Officer and the Board.

The Hearing's Officer lacks the judicial independence necessary to be an independent hearing body in this matter as he is under the direct control of the Board without any rules and regulations with which to proceed, all in violation of Nevada law. NRS 233B.050.

"There is, however, authority that a judge may not try a case in which he has formed an opinion of the case, before trial, in favor of one of the parties. A **judge** is, on this view, **disqualified** where he **makes statements in advance of the trial amounting to a prejudgment of the case.** Where under such circumstances a judge erroneously denies a change of venue or a change of judge, the judgment will be reversed on appeal although there is no showing of any prejudice in the trial."

46 AmJur 2d 169
(emphasis provided)

See, Haldane v. Haldane, 232 Cal. App. 2d 393, 42 Cal Rptr.; Rugenstein v. Ottenheimer, 152 P. 214 , 78 Or 371 (1915); State ex rel. Barnard v. Board of Education, 52 P. 317, 19 Wash. 8 (1898); State v. Espinoza, 754 P.2d 1287 (1988).

The touchstone of all of our judicial process in the United States is a fair trial in a fair tribunal. In Withrow v. Larkin, 421 U.S. 35, 46, 95 S.Ct. 1456, 1464 (1976), the Court stated as follows:

"Concededly, a 'fair trial in a fair tribunal is a basic requirement of due process.' *In re Murchison*, 349 U.S.133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955). This applies to administrative agencies which adjudicate as well as to courts. *Gibson v. Berryhill*, 411 U.S. 564, 93 S.Ct. 1689, 1698, 36 L.Ed.2d 488 (1973). Not only is a biased decisionmaker constitutionally unacceptable but '**our system of law has always**

endeavored to prevent even the probability of unfairness.' *In re Murchison*, supra, 349 U.S., at 136, 75 S.Ct., at 625; cf *Tumey v. Ohio*, 273 U.S. 510, 532, 47 S.Ct. 437, 444, 71 L.Ed. 749 (1927). In pursuit of this end, various situations have been identified in which **experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.** Among these cases are those in which the adjudicator has a pecuniary interest in the outcome and in which he has been the target of personal abuse or criticism from the party before him."

(emphasis provided)

The Supreme Court has generally authorized combining the investigative and adjudicative function as long as the system is properly designed and works well. Withrow v. Larkin, supra 421 U.S. at 49, 95 S.Ct. at 1465 states as follows:

> "More recently we have sustained against due process objection a system in which a Social Security examiner has responsibility for developing the facts and making a decision as to disability claims, and observed that the challenge to this combination of functions 'assumes too much and would bring down too many procedures designed, and working well, for a government structure of great and growing complexity.'*Richardson v. Perales*, 402 U.S. 389, 410, 91 S.Ct. 1420, 1432, 28 L.Ed.2d 842 (1971)

The Court did recognize, however, that the problems associated with combining those

functions are substantial. Withrow v. Larkin, supra 421 U.S at 59, 95 S.Ct. at 1466 states as follows:

> "That is not to say that there is nothing to the argument that those who have investigated should not then adjudicate. The issue is substantial, it is not new, and legislators and others concerned with the operations of administrative agencies have given much attention to whether and to what extent distinctive administrative functions should be performed by the same persons" No single answer has been reached. Indeed, the growth, variety, and complexity of the administrative processes have made any one solution highly unlikely."

Reference was also made therein to several federal cases which found due process violations in administrative law cases.

> "In *Texaco, Inc. v. FTC*, 118 U.S. App.D.C. 366, 336 F.2d 754 (1964) vacated on other grounds, 381 U.S. 739, 85 S.Ct. 1798, 14 L.Ed. 2d 714 (1965), the court found that a speech made by a commissioner clearly indicated that he had already to some extent reached a decision as to matters pending before that Commission." Withrow v. Larkin, supra 421 U.S. at 59, 95 S.Ct. at 1466

The United States Supreme Court most recently discussed the obligations of the state concerning the authorization and operation of peer review. Patrick v. Burget, ___ U.S. ____, 108 S.Ct. 1658 (1988). The Court said that there must be a **clear articulation of state policy** and further the Court stated that the peer

review activity must be **actively supervised** to make certain that: (1) the decision of the peer review comported with state policy and (2) any abuse of that peer review system **is corrected**.

II.

Dr. Bass' Privileges were Never Limited by the United States Air Force.

The decision by Brigadier General Robert A. Buethe, Jr. reinstating Dr. Bass' privileges **ab initio** has a plain meaning. *Black's Law Dictionary*, Fifth Edition, defines ab initio as follows:

> "From the beginning; from the first act; from the inception. A party may be said to be a trespasser, an estate said to be good, an agreement or deed said to be void, or a marriage or act said to be unlawful, *ab initio*. Contrasted in this sense with *ex post facto*, or with *postea*. "

Nevada courts as well as Courts throughout the United States use the term "ab initio" regularly and its meaning is unambiguous. It is a determination that reflects error in this case that was serious enough in the view of the Air Force to require this type of correction. The Air Force in addition, instructed the Federation of State Medical Boards, the data bank where the Board obtained its information in the first place, to delete Dr. Bass' name therefrom.

III.
Dr. Bass Cannot be Required to Advise the Medical Board of Errors Made by the United States Air Force

The two remaining charges herein allege that Dr. Bass failed to tell the Board about the erroneous orders of alleged limitation by the Air Force. This just does not state any charge or make any sense.

Dr. Bass was unaware of anything other than that he believe he had a contractual dispute with the Air Force which was resolved. He became aware of the alleged limitation at the time he was served with a public complaint by the Board. He had not been given the opportunity of being notified of the complaint nor given an opportunity to explain the facts and circumstances behind the alleged complaint, in violation of NRS 233B.127(3). Counsel has searched for case authority but can find none at this time wherein anybody has charged a person with failing to report the error of another. The Hearing's Officer herein and the attorney for the Board have previously determined as a matter of law that in the event Dr. Bass' clinical privileges were not limited by the United States Air Force on November 17, 1986, that there would be no legal or factual basis with which to proceed.

The following is an excerpt from the transcript of the hearing before Hearings Officer Dolan on April 6, 1988 in Reno, Nevada:

"HEARING OFFICER DOLAN:. . . .

He has notice that the charge is that on November 17, 1986 the United States Air Force restricted his clinical privileges.

It seems to me that we should establish with all deliberate speed and with due process whether or not that is a factual statement.

If in fact his clinical privileges were not restricted by the United States Air Force on November 17, 1986, then it seems to me it dissolves the entire basis factually and legally for the allegations that are contained in the amended complaint.

Do you agree or disagree, Mr. Lessly?

MR. LESSLY: Agree.

HEARING OFFICER DOLAN:

And the rest of the complaint then flows from that particular document which simply says that at the time on July 1st, 1987 that Mr. Bass renewed his licensure he answered no to a question as whether or not his privileges had ever been restricted during any time preceding the last filing and the renewal of his application at that time, and **so that if in fact there was no restriction that occurred on November 17, 1986, then Counts II and III and IV have no factual basis** insofar as they allege in effect that he failed to report that restriction on his clinical practice at the time he renewed his application. At least that's my understanding of the nature of the charges

that have been alleged against your client. Mr. Lessly, is that --

MR. LESSLY: That's correct.

HEARINGS OFFICER DOLAN: Is that the correct factual basis?

MR. LESSLY: That's correct. (emphasis supplied) (Hearing Trans. p. 17, Lines 5-25 and p. 18, Lines 1 - 13)

The Hearing's Officer and the Board then changed their mind after the Air Force issued their ab initio ruling and decided that Dr. Bass could be guilty of failing to tell the Board of something he was unaware of.

This is a violation of the concept of "law of the case" as announced by the Nevada Supreme Court. See: LoBue v. State Department of Highways, 92 Nev. 529, 554 P.2d 258 (1976) and Wickliffe v. Sunrise Hosp., 104 Nev. Adv. Opn. 133, 766 P.2d 1322 (Nev. 1988).

This also constitutes arbitrary, capricious, and malicious conduct on behalf of the Board and its members and the Hearing's Officer as their alter ego in violation of NRS 630.364.

IV.
That the Due Process Clause of the Fifth and Fourteenth Amendments of the United States and Nevada Constitutions have been Violated.

From the beginning of these proceedings, Dr. Bass has raised the defense that these proceedings have lacked due process in violation of the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution.

This issue has been briefed many times in this proceeding and we would therefore adopt our prior points and authorities filed herein with regard to that issue.

Conclusion

There is no factual basis to support the complaint herein as there is no evidence whatsoever that Dr. Bass' privileges or license were ever limited in any fashion by the Air Force. The final judgment of the Air Force reflects that fact unmistakably.

WHEREFORE, Respondent prays that the above entitled matter be dismissed and sealed.

Respectfully submitted,

/s/ R. Paul Sorenson
Attorney for Respondent
323 Las Vegas Blvd. South
Las Vegas, Nevada 89101

BEFORE THE BOARD OF MEDICAL
EXAMINERS
OF THE STATE OF NEVADA

Filed February 12 1990
Case No. 9455

In the Matter of the Complaint

Against

HARRISTON LEE BASS, JR., M.D.,

Respondent.

_____/

EXCERPT OF

BRIEF OF THE BOARD REGARDING LEGAL ISSUES

****

With respect to the hearing officer's question as to the effect of the reversal of the military limitation decision on appeal by virtue of an order reversing the limitation ab initio, such order has no effect on these proceedings. Granted, had Respondent had an order reversing the military decision on appeal ab initio prior to filling out his application for licensure and submitting it to the Board for licensure, he might have an argument that the military order "ab initio" would entitle him to answer that no action had been taken with respect to the

limitation to his practice or limitation of his hospital privileges.

****

Respectfully submitted this 12th day of February, 1990.

MOSCHETTI & LESSLY

BY: /s/ Larry D. Lessly
Larry D. Lessly
1105 Terminal Way, Ste. 302
Reno, NV 89502
Attorney for the Nevada State
Board of Medical Examiners

IN THE SUPREME COURT
OF THE STATE OF NEVADA

Filed October 2, 1995
No. 25605

BOARD OF MEDICAL EXAMINERS OF THE STATE OF NEVADA; THEODORE JACOBS, M.D., EVA G. SIMMONS, THOMAS J. SCULLY, M.D., DELMAR E. SNIDER, M.D., IKRAM U. KHAN, M.D., M. RONALD AVERY, JR., M.D., KATHLEEN L. EBNER, H. NAFEES NAGY, M.D., AND LEO A. WILNER, BOARD MEMBERS OF THE NEVADA STATE BOARD OF MEDICAL EXAMINERS,

Petitioners,
vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE STEPHEN HUFFAKER, DISTRICT JUDGE,

Respondents,
and

HARRISTON LEE BASS, JR., M.D.,

Real Party in Interest.

HARRISTON LEE BASS, JR., Real Party in Interest's PETITION FOR REHEARING RE: ORDER GRANTING PETITION FOR WRIT OF PROHIBITION

COMES NOW, HARRISTON LEE BASS, JR., Real Party in Interest, by and through his attorney, R. PAUL SORENSON, and files his Petition for Rehearing Re: Order Granting Petition for Writ of Prohibition entered herein on August 25, 1995, as follows:

Introduction

This Court entered its Order granting Petition for Writ of Prohibition on August 25, 1995. The basis for that Order was that Dr. Bass was not prejudiced by the arbitrary and capricious act of the Board of Medical Examiner's (hereinafter BME) changing venue from Las Vegas to Reno. The Court overlooked or misapprehended Judge Huffaker's ruling. Judge Huffaker was attempting to afford the BME an opportunity to correct their obvious errors. He singled out the conduct which to him represented an unquestionable abuse of their power.

This Petition for Rehearing will be addressed solely to the facts and law this Court has overlooked or misapprehended. We will show in this Petition that Judge Huffaker in his Order only exposed the tip of the iceberg of the arbitrary and capricious acts the BME committed in these proceedings in violation of NRS 233B.135(3) .

Misapprehended or Overlooked Facts

Dr. Bass' initial answer to the petition for Writ of Prohibition addressed itself primarily to the authority of Judge Huffaker to remand the

case to the BME, based solely upon the issue of venue. Dr. Bass however did point out to the Court in his Statement of the Case and Facts that he had been found guilty for a mistake of the United States Air Force [*See pages 2 through 4 of Dr. Bass' Answer*] Dr. Bass believes that the Court misapprehended or overlooked the factual basis of the claim against him. A timeline is necessary to avoid further confusion concerning this matter.

11/17/86 Nellis Command issues an order based on an alleged military violation. The penalty for that violation makes **it appear** that it is a restriction on Dr. Bass' medical privileges. Dr. Bass vehemently disagreed with the order for the reason that he believed the same was based on fraud as well as racial and professional bias. Dr. Bass, shortly after this Order, advised the USAF that he would not accept the their proposed punishment and that he wished to be released from his contract.

12/3/86 Dr. Bass files an application with Community Hospital. He responds to questions concerning medical restrictions in the **affirmative**. He also explains that the restrictions have no medical basis.

12/8/86 Dr. Bass files an application with Desert Springs Hospital. He responds to questions concerning

medical restrictions in the same manner as to Community Hospital.

12/18/86 Dr. Bass has a discussion with the Commander who issued the **11/17/86** Order and Dr. Bass receives from him a letter explaining that this Order was for **military environment adaption purposes only** and was not intended to reflect upon his conduct as a doctor. During this discussion and during many other discussions, Dr. Bass was advised that military matters of this nature were subject to the *Privacy Act* . Dr. Bass realized he did not have any restrictions or limitations on his medical license as are commonly understood. He further believed that the USAF had corrected the original misnomer

5/28/87 Effective date of discharge of Bass.

6/8/87 Dr. Bass files his application for renewal of his medical license with the BME and responds in the **negative** to questions concerning restrictions on his medical license and privileges.

11/19/87 Dr. Bass files application with Humana Hospital Sunrise and responds in the **negative** to questions concerning restrictions on his medical license and privileges. [an addendum was

submitted to respond to a direct question about the incident at Nellis which came about by means of medical community gossip.]

12/14/87 BME files a public complaint against Dr. Bass concerning his answers on the renewal application. This was filed without any investigation and further without seeking any explanation from Dr. Bass concerning his answers.

1/12/88 Dr. Bass files a Motion to Dismiss [basis: violation of the Privacy Act, 5 USC 552A as well as illegal and malicious acts of persons unknown to Bass at the time of filing his motion.]

10/20/88 Brig. Gen. Buethe, Jr., Command Surgeon, USAF, issued a decision after reviewing the Command Appeals Committee findings to reinstate Bass' medical credentials **ab initio** thereby voiding the Order of 11/17/86

10/27/88 Bass files a supplement to his Motion to Dismiss based on the decision of Brig. Gen. Buethe, Jr.

1/22/89 Board denied Motion to Dismiss Counts Two and Four

8/6/91 Board finds Bass guilty of Counts Two and Four. However, in its findings, **deleted any reference** to

"false" statement as the Board recognized that Dr. Bass' answers were true. The Board felt that the correct answer required an additional explanation even though their form did not call for the same and unless specific questions were addressed, a complete answer was impossible.

Dr. Bass was charged by the BME in Counts 2 and 4 as follows:

"Count Two. . .

IV. That Respondent's conduct in failing to disclose the United States Air Force's **restriction** on his practice of **medicine**, constitutes a violation of NRS 630.304(1) by renewing, or attempting to renew, a license to practice medicine by **fraud** or **misrepresentation**, or by a **false**, misleading, inaccurate or incomplete statement.:

Count Four

IV. That Respondent's conduct in failing to disclose the **suspension** of **clinical privileges** at United States Air force Hospital, Nellis Air Force Base, Nevada, constitutes a violation of NRS 630.304(1) by renewing,or attempting to renew, a license to practice medicine by **fraud** or **misrepresentation**, or by a **false**, misleading,inaccurate or incomplete statement." [emphasis provided]

Dr. Bass answered these counts of the complaint as follows:

"SECOND DEFENSE (Count Two)

. . .

"3. In answer to Paragraph IV, Respondent denies that he violated NRS 630.304(1) as alleged in that paragraph and in further answer thereto, alleges that the answers that he placed on his application for renewal of medical license were placed there in a good faith belief by the Respondent that the Air Force incident was purely an administrative procedure, for military purposes only, and that its disclosure was a violation of the Privacy Act, 5 USC 552A and further beyond the jurisdiction of this Board, NRS 630.047(1)(a)[1]. . .[footnote added]

FOURTH DEFENSE (Count Four)

3. Respondent denies the allegations contained in Paragraph IV, and in further answer to said paragraph, realleges Paragraph 3 of the Second Defense as though set forth herein in its entirety."

The following is the violation that Dr. Bass was found to be guilty of by the BME:

"That by clear and convincing evidence Respondent is in violation of the provisions of NRS 630.304(1) as alleged in

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[1]NRS 630.047(1)(a):

1. This chapter does **not** apply to:

(a) A medical officer of the armed services or a medical officer of any division or department of the United States in the discharge of his official duties for which a license is not required;. . . ." [emphasis provided]

> Count Two and Count Four of the amended complaint as he submitted to the Board "**misleading, inaccurate or incomplete**" responses to questions number 4 and 5 on his June 8, 1987 application for licensure." [emphasis provided]
>
> [*Record on Appeal, filed with Eighth Judicial District Court, page 333, in Petition for Judicial Review action before Judge Huffaker*]

Misapprehended or Overlooked Legal Authorities

Dr. Bass clearly told the BME that he did not believe he had any restrictions on his medical license or privileges on June 8, 1987 when he filed his application for renewal of his medical license. He reaffirmed that position when he filed his answer to the complaint. He also clearly told the BME that the information that they received from the USAF was the result of fraud as well as malicious and illegal acts of unknown persons [this is one of the usual basis for setting aside fraudulent judgments.]

It is now also clear that the BME recognized that Dr. Bass' answer was correct as they deleted the words "fraud, misrepresentation and false" from the charge when they entered their findings. They relied instead on the words "misleading, incorrect or incomplete." The questions called for yes or no responses. An explanation was only required if the question was answered yes. Dr. Bass had arrived at his opinion concerning his medical privileges long

before he filed his renewal application on June 8, 1987. No one had any knowledge that the matter was going to be made public before June 30, 1987 when the USAF filed their mistaken report with the Federation.

It would seem basic that the charges against Dr. Bass should have been immediately dismissed as a result of the Order of the United States Air Force dated October 20, 1988. Instead, the BME continued their arbitrary, capricious and biased course of conduct and found Dr. Bass guilty of a charge over which they had no jurisdiction and upon which there was no evidence of any violation.

> "MS. SIMMONS: It would seem to me that even if all that were true and reasonable, the appropriate response to the question still should have been "Yes", but with the explanation of all of these other things that happened, and the admission that the Air Force made a mistake, and all that."
>
> [Adjudication Hearing, June 7, 1991, ROA Transcript 6, page 27, lines 15-19]

It is clear from reading the above reasoning of the BME that they were requiring Dr. Bass to be omniscient on June 8, 1987 concerning the mistake the USAF was going to make on June 30, 1987 after he filed his Application for Renewal; and that the USAF did not admit making until October 20, 1988.

NRS 233B.135(3) provides:

> The court shall not substitute its judgment for that of the agency as to the weight of evidence on a question of fact. The

court may remand or affirm the final decision or set it aside in whole or in part if substantial rights of the petitioner have been prejudiced because the final decision of the agency is:

(a) In violation of constitutional or statutory provisions;
(b) In excess of statuory authority of the agency;
(c) Made upon unlawful procedure;
(d) Affected by other error of law;
(e) Clearly erroeneous in view of the reliable, probativeand substantial evidence on the whole record; or
(f) Arbitrarily or capricious or characterized by abuse of discretion.

The decision of the BME was in excess of its statutory authority and in direct violation of NRS 630.047(1)(a). The only evidence in front of the BME confirmed that this matter was military and not medical. The plain meaning of NRS 630.047(1)(a) specifically prohibits the BME from getting involved in military matters.

Besides the fact there is no evidence to support the charges of which Dr. Bass was found guilty, the BME had apparent difficulty understanding the meaning of the term "***ab initio***." The case that appears closest on point is United States v. Allen, 27 M.J. 234 [CMA 1988]. In that case, the accused was convicted of making a false statement concerning his marital status. His wife had obtained a divorce in some fraudulent manner and the state court who signed the Decree subsequently entered an

order voiding the divorce **ab initio.** The accused had signed his statements between the time of the fraudulently obtained divorce decree and the revocation of the same. The appellate court held that it was a violation of the full faith and credit provision of the United States Constitution [Article IV, Section 1] and 28 USCA § 1738 to fail to give full effect to the revocation [***ab initio***] provisions of the Decree. The appellate court in overruling the trial court's decision stated:

> "He [the trial judge] surprisingly refused to credit that portion of the revocation decree that voids the earlier divorce decree ***ab initio***. He categorically asserted this decree could not nullify the 'action of an individual during the period when North Carolina recognized the parties as divorced.' No authority,federal, state or military was cited for this legal conclusion."

Dr. Bass is here faced with the same dilemma. The BME accepted the initial order of the USAF, however, refused to give the subsequent revocation order its true legal effect. The initial order was corrected by the USAF on 10/20/88. The full faith and credit provisions of the United States Constitution requires that Nevada recognize the final determination of the USAF--not prior orders. These charges must be dismissed forthwith to prevent any further prejudice.

The BME has been guilty of other violations of NRS 233B.135(3). These are set forth in Dr. Bass Points and Authorities in support of his Petition for Judicial Review and

included as **Exhibit 11** in Dr. Bass' Appendix in this action.

As indicated above, venue was just the tip of the iceberg. The heart of the iceberg was finding Dr. Bass guilty of an offense for telling the truth.

CONCLUSION

Although this Writ proceeding was directed to the issue of venue, it is not only appropriate but necessary that Dr. Bass point out to this Court that he has been convicted of telling the truth. That is not an offense under Nevada law.

This Court in examining the venue issue exclusively, determined that Dr. Bass was not prejudiced by having the hearing in Reno. Even Judge Huffaker had determined the prejudice to be slight. However, what this Court is overlooking is the concommitant effect of all the arbitrary, capricious and biased conduct in the proceedings toward Dr. Bass with the venue issue being the tip of a massive iceberg.

The extreme delay in considering the very simple issue of ***ab initio*** is enough for this Court to step in and give Dr. Bass the relief he deserved back in October of 1988.

Substantial justice dictates that this Court grant the rehearing and dismiss the proceedings against Dr. Bass on the entire record--not just

venue. Alternatively, Dr. Bass would request remand of the entire matter to Judge Huffaker for further consideration of the entire record.

Respectfully submitted,

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